IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FAMILY COURT APPEAL NO.103 OF 2002

Mrs. Leela Krishna Kumar ... Appellant.
(Org.respondent)

Versus

Pilapalli Madam Gopalkrishna Krishnakumar ... Respondent.
(Org.Petitioner)

Shri G.R. Hegde for appellant.
Shri V.Ramkrishnan and Ms. Sunita Kalwar for respondt.

CORAM: S.B.MHASE &
S.R.SATHE,JJ.
DATE : 13th July 2005.

ORAL JUDGEMENT (PER S.B.MHASE,J):

1. This Appeal is directed against the judgement and decree passed by the Family Court No.2, Bandra on 31st August 2002 in Petition No. A-1291/1998. By the said judgment and decree the marriage solemnized between the Appellant and Respondent on 14th May 1992 was dissolved under section 13(1)(i-b) of the Hindu Marriage Act, 1955 and the Respondent has been directed to give maintenance at the rate of Rs.2000/- per month to Appellant-wife for the minor child Vidyalakshmi from the date of the Order till she (Vidyalaxmi) gets married.

2. The Marriage Petition under Section

13 (1) (i-a) and 13(1)(i-b) of the Hindu Marriage Act 1955 was filed by the Respondent-husband as against the Appellant-wife. Two grounds were made out namely cruelty and desertion. Further there was prayer for granting access to the child. However, the said prayer is not granted by the trial court. The Family Court has refused to pass the decree on a ground of cruelty under section 13(1)(i-a) of the Hindu Marriage Act. It is averred in the Petition that the marriage between Appellant-wife and the Respondent/husband was solemnized on 14.5.1992 at Mumbai according to Hindu Vedic rites and ceremonies. Prior to the marriage both were spinster and bachelor respectively. The Respondent is in service with Bank of Baroda while the Appellant-wife is in service with the Western Railway at Churchgate as a 'Typist'. After the marriage they resided at 3/36 Azad Nagar, Andheri (W),Bombay wherein, alongwith the Respondent his parents were staying. His parents are 'Pensioners' retired from the Government service. Thus, the Appellant, Respondent and the parents of Respondent are the members of the said family who were residing in the matrimonial house. Out of the wedlock, on 2nd

March 1993 Appellant and Respondent have got female child Vidyalakshmi. It is also averred that the office timing of the husband is 9.15 a.m. to 4.30 pm., while the office timing of Appellant-wife is 10.00 am. to 6.30 pm. It is the case of the Respondent-husband that since both the Appellant and Respondent were employed and that their office timings were as stated above, Respondent's mother used to get up early in the morning and after her morning ablution, she used to keep the breakfast and tiffin boxes ready for the Appellant and Respondent. Similarly, she used to keep the dinner ready in the evening, so that the Appellant would not be put to any inconvenience after her return from office. It is further averred that even on the holidays and weekends Respondent's mother used to do all the household work leaving only some Sunday work to be done at home by the Appellant. Respondent-husband further averred in the Petition that right from the beginning of the marriage Appellant was adopting non-cooperative attitude towards him and his aged parents. However, respondent over looked her conduct hoping for better days, by consoling himself with the fact that the Appellant is a working girl and that she

would in the course of time identify herself with his family. But it was a hope in vain. It is further averred that the entire household expenses was made by the Respondent-husband and Respondent never demanded anything from Appellant-wife. According to Respondent-husband, Appellant is getting Rs.5000/- to 6000/- as salary per month, but Appellant has not contributed anything for the maintenance in the house and has not disclosed to the Respondent as to how the amounts are used. The grievance of Respondent is that on being asked about the salary slip,the Appellant flatly refused to oblige him. Thereafter Respondent did not bother about her salary slip with the fear of unpleasantness in the house. It is further the case of the respondent that his parents and in laws had great admiration, love and affection for their daughter in law . Respondent’s father voluntarily opened bank account in the name of Appellant and also with the local Post Office and used to deposit periodically moneys for the benefit of their daughter-in-law. It is the case of the respondent-husband that in spite of love, affection and admiration shown by his parents , Appellant had never cared to respond them and on the contrary she

showed disrespectful behaviour towards them. He alleged that the Appellant was always adamant, dominating, abusive, indulging in indecent and filthy language towards his parents which was very much unbecoming of any daughter-in-law. According to the Respondent this was also ignored by his parents with the hope that in the course of time she would realise her mistakes. However, that was also in vain. It is further averred that after a child was born , there was no change in the attitude of the appellant towards the parents of Respondent. It is averred that the bathing of the infant was looked after by the mother of the Respondent and she used to take great care in bathing the child, feeding her, and devoting all her time in caring and maintaining the child. It is alleged that, however, Appellant never appreciated these sentiments of his mother and instead, the appellant continued with her non-cooperative, adamant and stubborn attitude towards him and his parents. On being pointed out the Respondent’s mother’s love and affection towards the child Vidyalakshmi, it is alleged that the Appellant flared up and retorted by stating that he might as well have married his mother or slept with

her instead of appellant. Then it is alleged that the appellant was very much money minded and materialistic. To support this, the incident of August 1993 was quoted by the Respondent. The child was used to be fed with milk in a milk bottle, Respondent's mother was very much aware that it was necessary to keep the milk bottle spotless and hygienically clean to avoid any infection to the child, therefore, appellant was requested by the respondent to buy a milk cleaner which was available in a departmental store near Churchgate Railway Station where her office is situated. However, the Appellant completely ignored his request and returned home in the evening without purchasing the cleaning brush.When it was reminded to appellant, she retorted saying that neither the Respondent nor his mother had paid for the purchase of the milk bottle cleaner. It is alleged that though the Appellant had money with her, and the price of the bottle cleaner was about Rs.10 or 12, it was not spent.

3. It is further averred by the respondent-husband that in August 1994 the Appellant manhandled his mother without any reason.

Since the Respondent's parents had in their mind welfare of the Appellant and Respondent, they provided them flat of 800 sq.ft. at Kalyan and suggested that the child should be left with them to be looked after. The suggestion was agreed to by the Respondent and Appellant. Accordingly in August 1994 both of them shifted to a flat at Kalyan leaving the minor child Vidyalakshi with the parents of Respondent at Andheri. It is further averred that at the instance of the Appellant, in December 1994 Appellant and Respondent returned to Andheri house. It is further the case of the Respondent/husband that on 27th January 1995 appellant left the home as usual in the guise of attending her office. On her return in the evening the Appellant started behaving in a very strange manner and refused to take any food even though it was kept ready. According to the Respondent, Appellant went on hunger strike. On being made queries it was learnt that the Appellant had not attended the office on that day. Because of this, it is averred that the Respondent got apprehension that the Appellant was making preparation to leave the matrimonial house. On 28th January 1995, Appellant, Respondent and the Respondent's parents

were at home. Apprehending some trouble at the hands of the Appellant and her parents, the Respondent-husband lodged complaint on 28th January 1995 with C.I.D., Social Security Branch,Crawford Market, Mumbai. On 29th January 1995 at about 5.00 p.m. Respondent-husband was surprised to find that the father and brother of the appellant had come to the matrimonial house. By that time, the appellant had kept all her articles and belongings duly packed. Soon after her father and brother came the appellant collected her belongings and took the minor child with herself and left the house with father and brother, without so much as having the courtesy of even informing the Respondent and/or his aged parents. It gave clearest indication to Respondent-husband that the appellant-wife had formed in her mind the necessary animus to desert the matrimonial home permanently and to bring the marital tie to the breaking point. This was further clear from the fact that the appellant had deliberately left behind the wedding saree and the dresses of the child which the respondent had given. It is averred by the Respondent that attempt on the part of the Respondent and his parents to persuade the appellant not to leave the

home failed because Appellant was adamant and her father and brother also did not dissuade her from leaving the house.

4. It is the case of Respondent-husband that the father of Respondent had taken a locker in Dena Bank, Versova Branch and the ornaments of the appellant were lying in the said locker. On or about third week of March 1995 father of Appellant sent letter to respondent demanding the ornaments of Appellant-wife. Therefore, Respondent's father took out the said ornaments from the locker and retained them in the matrimonial home. On 26th March 1995 the appellant visited Respondent's house alongwith her sister Mrs. Sheela K.Nair, when the Respondent's father handed over the ornaments to the Appellant. After checking the ornaments appellant signed a receipt duly witnessed by her sister and one family friend of the respondent by name M.L.Anantharaman. This also, according to respondent, is a fact which shows animus to desert the matrimonial home permanently and severe the marital relations. Thus, the respondent has claimed divorce on the ground of cruelty and desertion.

5. The Appellant-wife has filed a written statement before the Family Court . She has denied all the allegations made by the Respondent-husband. It is pointed out that Andheri flat which was a matrimonial house is hardly of 400 sq.ft. with one room kitchen and after marriage of Appellant with Respondent, sister of Respondent also came to reside there till the Appellant went to her parents house for delivery. There was absolutely no privacy in the life of appellant and respondent. The Appellant-wife has pointed out that the working hours of appellant were from 9.15 a.m. to 5.45 pm and not from 10.00 am to 6.30 pm. She has denied that mother of Respondent was preparing the food and breakfast etc. She has clarified that the Appellant had to get up early in the morning and prepare breakfast for the family and tiffin for herself and her husband and used to attend the needs of the child before going to office. She has clarified that she was washing clothes, cleaning utensils and floor before going to work and that Appellant was not allowed to wash clothes, utensils, etc. inside the bathroom. The washing was required to be done by the appellant in

the compound. As a result of which appellant used to be late in the office. Appellant claimed that the lunch and dinner was cooked together and Appellant had to do cleaning work in the kitchen after she came from office in the evening. Appellant averred that she cooperated to the best of her ability in the matrimonial house. On the contrary, the in-laws were never satisfied and used to find faults with the appellant for anything and everything and, interfere in all the matters. The appellant has averred that she had to take permission from the parents of the respondent for everything, even for personal matters like taking bath in the evening after coming from the office or making tea for herself. The Appellant has accepted that she is a working girl but she has stated that her salary was only Rs.1750/- and not Rs.5000/- to 6000/- as alleged by the Respondent. The Appellant has averred that after marriage when she received the first salary on 31st May 1992, it was handed over to the respondent who in turn handed it over to his father. It was informed by the father of the respondent that a sum of Rs.1,000/- would be deducted from the salary every month as appellant’s contribution towards the household expenses and the

rest of the amount would be deposited in the joint account of Respondent and Appellant. Since then the Appellant had handed over her salary alongwith her salary slip to Respondent-husband and this practice continued till the Appellant was staying in the matrimonial house. The Appellant further averred that even her salary during the period of maternity leave had to be accounted to the respondent’s father by the appellant in the form of Fixed Deposit. Thus, the Appellant denied that the allegations that Appellant had not contributed anything for the maintenance of the household and did not disclose amount of salary. The Appellant-wife denied that the Respondent’s parents had admiration , love and affection for the appellant. According to the appellant, father of Respondent used to treat her with contempt and took every opportunity to scold and shower her with most filthy language unbecoming of an elderly person. The Appellant has averred that in spite of such tortures she respected her in-laws and silently suffered keeping the welfare of her child in mind.

. So far as the incident of bathing her child is concerned, Appellant has averred that

she used to bathe the child from the time she (child) became three months old i.e., from the time appellant went to the matrimonial home after delivery. According to Appellant, respondent's mother instructed the Appellant to bathe the baby, feed her and put her to sleep before appellant left for her office in the morning and she was expected to do all these things in addition to attending other household works such as washing of clothes , preparing breakfast and tiffin etc. The appellant has averred that there was a marked difference in the attitude of the in laws towards appellant on her return to matrimonial home after her delivery. Probably because the in laws did not want to have a girl baby in the house as a first child and they used to taunt Appellant and parents of appellant.

. According to the Appellant, the instances of harassment by the in-laws increased after appellant returned to the matrimonial home after delivery. The Appellant has denied the contention of Respondent that after delivery there was change in the attitude of Appellant and explained that there was no such change in the attitude of appellant. However, it was so felt by

Respondent, may be because the Appellant was unable to attend all the household work in the manner as Appellant was doing before, as she has to devote considerable time to attend to the child. The appellant denied the allegations that Appellant had told Respondent that respondent should have married to his mother or slept with her. Instead Appellant contended that it is utterly false. According to appellant, if the Appellant found it impossible to live in peace in matrimonial, it is because of the parents of the Respondent and their indulgence in every silly matter which made life of Appellant-wife miserable in the matrimonial house. Respondents parents used to speak ill of the appellant and always used to say that the Appellant brought only ill luck to them and since Appellant was in their house they did not have any prosperity. The Appellant further averred that Respondent used to come two hours earlier from his duty than the Appellant and Respondent’s mother used to poison his mind with all sorts of false allegations in the result the respondent used to be ready to pick up quarrels with appellant and shower abuses, the moment Appellant enters the house. The Appellant has specifically stated that initially

during the bed time Respondent used to apologize to Appellant stating that Respondent was forced to misbehave with her at the instance of his parents. The Appellant claimed that, however, the respondent made it a habit of ill treating appellant on regular basis. The Appellant has stated that the parents of Respondent in their foul design to throw Appellant out, had been creating evidence by writing letters to the father of appellant making wild and baseless allegations against Appellant. However, parents of appellant never interfered with the appellant’s affairs.

. The Appellant-wife has claimed in written statement that Respondent and his parents were miserely and money minded people and they did not allow her to extend the maternity leave and told her not to delay to join the duty because according to them money was most important for the family. The appellant explained about the incident of purchase of bottle cleaner stating that the entire salary of appellant was taken by Respondent-husband, and therefore, appellant had no money to buy a bottle cleaner and when Appellant asked some money from Respondent-husband same was

refused. Thus, the Appellant claims that if money was not available how she could purchase the bottle cleaner.

. Coming to the incident of man handling mother of respondent, the Appellant contended that she never man handled the mother of Respondent. On the contrary she averred that, the mother as well as the father of Respondent on several occasions man-handled Appellant without any rhyme or reasons. In explaining the incidence of August 1994 which led the appellant and Respondent to shift to Kalyan, appellant has averred that it was a holiday being Saturday, at about 10.00 a.m. appellant went to have bath in the bathroom with clothes. Appellant was washing her clothes in the bathroom when the appellant’s mother-in-law came shouting to the bath room and banged the door. When appellant opened the door to find out what the matter was, her mother in law pulled her out of the bathroom and asked to go out in the compound to wash the clothes as appellant was not allowed to wash her clothes or utensils in the bath room. It is further averred that at this juncture father in law also asked the appellant to go out and wash the

clothes in compound, as has been instructed. Though appellant pleaded them that she can not go out as she was fully wet, her mother in law pulled her out of bathroom and started beating and pressing appellant against the wall. Appellant fearing for her life shouted for help and when the neighbours started looking out, the in laws closed the door and became quite for some time. However, when the respondent returned from the office at 2.30 pm his parents instigated him with all sorts of allegations against the appellant. The respondent then beat appellant severely alleging that appellant disobeyed his parents. The respondent refused to listen to the pleadings of appellant. Parents of respondent-husband also joined in beating. On hearing the cries of appellant, neighbours intervened and advised respondent to stay separately elsewhere since they had one flat in Kalyan. The in-laws then agreed to the said suggestion and therefore, appellant and respondent shifted to Kalyan flat which was empty with no household articles. All the household articles such as furniture, utensils and other fittings were purchased by appellant with the monies borrowed by her. However, the in-laws were

bent upon harassing appellant and as such they did not live with the parents of the respondent.

6. The appellant has further averred that appellant and respondent stayed in Kalyan flat only from mid August 1994 to first week of December 1994. Since it was informed by the parents of the respondent that in December 1994 they were going to native place and did not want their flat to be kept locked in their absence, the respondent should shift to Andheri Flat. The appellant readily agreed to the same with the hope that she would be able to stay with her child at Andheri flat. However, her in-laws took the child alongwith them when they went to Kerala and did not allow the child to be kept with appellant. The appellant-wife found a calculated move of the respondent and his parents to separate her child from her. The appellant contended that while she was residing in Kalyan she was not allowed to take her child during the week end or meet her during the working days. Appellant was also told not to have any contact with her parents and that she should not inform about shifting of her residence to her parents. In the first week of January 1995

parents of respondent returned and asked appellant to go back to Kalyan. By that time appellant noticed that health of the child had deteriorated and that she was not being fed properly. Therefore, the appellant informed her in-laws that she would go back to Kalyan only if her child was sent with her or else she would stay where the child was. This was decided by the appellant keeping in view the interest and welfare of the child. However, this was not liked by the in-laws and they were infuriated and increased their cruel behaviour towards appellant.

. Answering the incident of 29th January 1995 appellant has stated that on 27th January 1995, she was on leave and had been to the parents house to see her father who had returned from native place and she returned in the evening. Appellant did not eat anything after return as she had taken meals at her parent’s house and this was known to respondent. The appellant has denied that her behaviour was strange that evening after returning from the office. The appellant contended that on the contrary respondent and his parents abused and physically assaulted appellant for

meeting her parents. The appellant further averred that she had not made any preparation on her part to leave the matrimonial house. However, she noticed some hushed talk among the respondent and his parents and could smell something strange being planned by them as mother-in-law started packing her clothes in a suitcase. The appellant also noticed that one Anantharaman, a friend of her father-in-law who advises her in-laws in all family matters kept often coming in and going out of the house after giving some instructions secretly to her in-laws. The appellant has further averred that the police complaint was lodged by respondent was surprise to her and she learnt for the first time from this petitioner. This act of filing of complaint shows that there was guilty mind working behind this. At about 4.00 p.m. all clothes and belongins of appellant, except ornaments and sarees and dresses of the child given by the respondent, were packed by the respondent. On being enquired by the appellant, it was told to her that she should leave the house at the moment and her parents would be coming to take her. The appellant further averred that at 5.00 p.m . her father and brother came to matrimonial home and informed her

that they had come pursuant to the frequent telephonic calls received from her father-in-law for the last two days. They have come to find out what the matter was. Appellant has contended that respondents father did not allow the father and brother of appellant/wife to come inside their home and immediately kept the suit case outside the flat and asked appellant to get out of the house alongwith the child. The in-laws also abused the father and brother of the appellant. On being asked by the appellant to the respondent, the respondent told the appellant to follow the instructions of his parents and to go to her parent's house. Thus, the appellant claims that she was thrown out of the matrimonial home on 29th January 1995 by the respondent and his parents. The appellant denied that she has deserted the matrimonial house permanently or otherwise.

. The appellant has further averred that in the month of April 1995 there was marriage of appellant's brother and appellant did not have any ornaments to wear on that occasion. Therefore, ornaments were demanded by appellant's father on telephone. However, respondent's father asked

appellant's father to send a request letter by post. Accordingly request letter was sent. In turn, respondent's father informed that the appellant should come on 26th March 1995 at 4.00 p.m. to the matrimonial home to collect the ornaments. The appellant stated that accordingly the ornaments were collected, however appellant was firstly asked to sign a receipt and verify the ornaments. The appellant stated that by taking all the ornaments, she had no intention to desert the house and the allegations made by the respondent and his parents are not true.

. The appellant has further averred that inspite of the fact appellant was driven out of the house, appellant had been to the office of respondent alongwtih the child to see and talk to respondent. On all such occasions respondent refused to talk to appellant-wife or even look at the child or speak kindly to child. On the contrary he used to ask appellant to write to him and appellant had sent several letters and many photographs of the child. The respondent replied to such letters, but always made it a point to put the entire blame on appellant. At the time of

admission of the child in the school appellant requested respondent to accompany appellant to St.Xavier's School. However, since the respondent did not accompany appellant , the child could not get admission in a good school like St.Xaviers and ultimately the child was required to be admitted in another school on paying donation of Rs.8000/- since it was an un-aided school.

. The appellant has stated that in the month of September 1995, appellant's brother-in-laws Mr.M.K.K.Nair went to respondent's house with a view to find out the solution to the dispute. However, he was also abused by the parents of the respondent in presence of Mr.Anantharaman. The said Anantharaman asked the brother-in-law of appellant as to how much the appellant and her parents could bent before them. When enquired what he meant by 'bent', Mr.Anantharaman told him to come after two weeks so as to know about their decision. After two weeks brother-in-law visited the respondent's house. At that time he was told by said Mr. Anantharaman that the matter would be decided in the Court. The appellant has pointed out that an attempt to settle

the matter was in vain because of such attitude of the respondent.

7. On the basis of these pleadings of the parties, Family Court has considered the case of the respondent on a ground as to whether the decree for dissolution of marriage can be passed under section 13(1)(ia) and/or 13(1)(ib) of the Hindu Marriage Act, 1955. After considering the pleadings and evidence of the parties, as stated earlier, the Family Court has refused to pass a decree on a ground of cruelty under section 13(1)(ia) of the Hindu Marriage Act. However, the Family Court has passed a decree on the ground of desertion as provided under section 13(1)(ib) of the Hindu Marriage Act, 1955. The said decree is under challenge.

8. The appeal is filed by the wife who is original respondent. There is no cross appeal and/or objection on behalf of the respondent - husband. Since the prayer to grant decree of divorce on a ground of cruelty as provided under section 13(1)(ia) of the Hindu Marriage Act, 1955 is refused by the Family Court, this court is

called upon to consider the validity and legality of the decree as has been passed by the Family Court under section 13(1)(ib) of the said Act.

9. In order to prove his case, the respondent- husband has examined himself. He has not examined any other witness so as to corroborate his testimony. The appellant wife has examined herself and her father. Apart from the oral evidence of the parties, the correspondence exchanged between the parties has been produced from both the sides.

10. It is revealed from the evidence, pleadings and the correspondence that most of the instances as pleaded by the parties have been accepted by the parties, but each party has explained the said instances with certain modifications and with a different angle of appreciation of the said incident as per their own perceptions. The probative value of those instances etc., will be considered in the later part of the judgment.

11. Since the decree has been passed on

a ground of desertion under section 13(1) (ib) of the said Act, we are concentrating our judgment on the point of desertion as provided under the said clause. Therefore, before we consider the facts and the material on record in the present case, we propose to consider the law on the subject. The relevant provision of the Act, viz., section 13(1)(i-b) of the said Act is as follows:

> "13. Divorce. (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-
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> (i) being irrelevant not reproduced,
>
> (i-a) being irrelevant not reproduced.
>
> (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; ...."

12. The term "desertion" has been defined and explained in Explanation to the said Section 13 in these terms:

> "..... the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly."

13. The question as to what precisely constitutes the desertion came up for consideration before the Apex Court in an appeal from the Bombay where the Court had to consider the provisions of section 13(1) of the Bombay Hindu Divorce Act, 1947 whose language is in para materia with that of section 13(1)(i-b) of the Hindu Marriage Act, 1955. In the judgment of **Bipinchandra Jaisinghbai Shah v/s. Prabhvati reported in AIR 1957 SC 176** there is an elaborate consideration of the several English decisions in which the ingredients of the desertion were considered. The Apex Court has approved the summary of the law on the subject in Halsbury's Laws of England (3rd Edition) Volume 12. The said approved portion is as follows:

> "In its essence the desertion means

the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from co-habitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence."

14. The position is further explained by the Apex Court in the following words:

> "If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively..... ..... Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi

co-exists. But, it is not necessary that they should commence at the same time. The de-facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi co-incides in point of time; for example, when the separating spouse abandons the martial home with the intention expressed or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act has prescribed a period of four years as a continuous period during which the aforesaid two elements must subsist. Hence, if a deserting spouse takes advantages of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial home with all the implications of the marital life, before the statutory period is out or even after the lapse of that period, unless the proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence, it is not necessary that during all the period that there has been desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions which may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion like any other matrimonial matters, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the Courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the Court."

15. These observations of the Apex Court as reflected in AIR-1957 SC 176 (Bipinchandra Shah v/s. Prabhavati) were considered by the Apex Court in a latter judgment reported in **AIR 1964 SC 40 in the matter of Lachman Utamchand Kirpalani v/s. Meena @ Mota,** where the Constitutional Bench of the Apex Court while considering the decree for judicial divorce based on desertion has approved the ratio laid down in AIR-1957 SC 176. The approval is reflected from paragraph 19 of the said judgment, which is to the following effect:

> "The other matter is this. Once desertion, as defined earlier, is established, there is no obligation on the deserted husband (taking the case where he is the deserted spouse) the appeal to the deserting spouse to change her mind, and the circumstance that the deserted husband makes no efforts to take steps to effect a reconciliation with the wife does not debar him from obtaining the relief of judicial separation, for once desertion is proved the deserting spouse, so long as she evinces no sincere intention to effect a reconciliation and return to the matrimonial home, is presumed to continue in desertion. Of course, the matter would wear a different complexion and different considerations would arise where before the end of statutory period of two years or even thereafter before the filing of the petition for the judicial separation, the conduct of the deserted spouse was

> such as to make the deserting spouse desist from making any attempt at reconciliation. If he or she so acts as to make it plain to the deserting spouse that any offer on the part of the later to resume cohabitation would be rejected, then the deserting spouse could obviously not be blamed for not bringing the desertion to an end. Or again, if before the end of the period of two years or filing of the petition his or her conduct is such as to provide a just cause for a deserted spouse for not resuming cohabitation, the petition cannot succeed. For the petitioner would have to establish that the desertion was without just cause during the entire period referred to in section 10(1)(a) of the Act before he can succeed."

16. The law laid down in the above referred to two judgments has been further followed by the Division Bench of this Court in **Mukesh Bhagwands Ganatra v/s. Priti Mukesh Ganatra reported in 2003(3) Mh.L.J. 408.**

17. Thus, having noted the law laid down by the Apex Court on the point of desertion, which one has to consider whenever a decree for divorce or judicial separation is being claimed, we now proceed to examine the evidence led on behalf of the parties to find out whether the desertion has been proved in this case. And, if so, whether

there was a bonafide offer by the wife to return to her matrimonial home with a view to discharge marital duties. And, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

18. Admittedly, the appellant wife is not residing with the respondent- husband from 29th January 1995. The petition has been filed on 2.5.1998. Thus, it is revealed that from the date of separation, i.e., from 29.1.1995, period of more than 2 years was completed prior to the presentation of the petition. In respect of the fact of physical separation, however, there is a controversial story between the parties.

19. As per the respondent -husband on 29th January 1995, the appellant - wife as usual left the house in the morning to join her office and returned back in the evening and started to behave in a strange manner. According to the respondent husband, the appellant - wife refused to take any food even though it was kept ready. It was a case of hunger strike. According to the respondent-husband, it is further revealed that the appellant

- wife had not attended the office on that day. Therefore, the respondent has averred that the appellant - wife was making preparation to leave the matrimonial home. On 28th January 1995 it was Sunday and the respondent - husband and his parents were at home. The appellant was also at home. The respondent and his father apprehending some trouble from the appellant and/or her parents, in anticipation, recorded a complaint on 29th January 1995 with the CID Social Security Branch, Crowford Market and endorsed a copy thereof to Oshiwara Police Station.

20. According to the respondent - husband on 29th January 1995 at about 5.00 p.m., the father and brother of the appellant-wife came to the matrimonial home. By that time, the appellant had kept her articles duly packed. Soon after the father and brother of the appellant came into the matrimonial home, the appellant collected her belongings and took the minor child with herself and left the home with her father and brother without informing the respondent - husband or his aged parents. Thus, according to the respondent - husband, it was the clearest indication that the

appellant had formed in her mind animus to desert the matrimonial home permanently, and, thus to bring the marital tie to the breaking point. This animus is further evidenced, according to the respondent - husband, by the fact that the appellant - wife had deliberately left behind the wedding sarees and dresses of the child which were given by the respondent - husband. The respondent has further averred and stated that the attempts were made by him and his parents to persuade the appellant - wife for not to leave the house, but they failed in the said attempts. According to the respondent - husband her animus to desert him permanently is further evidenced from the fact that in the month of March 1995, the appellant's father sent a letter to the respondent demanding the ornaments of the appellant and in view of the such demand the respondent's father took out the ornaments from the locker. On 26th March 1995 the appellant visited the respondent's house along with her sister Mrs. Shila Nair and collected the ornaments after duly checking and signing a receipt thereof in the presence of family friend of the respondent, namely one Mr. M. L. Ananthraman. Since then, according to the respondent - husband,

the appellant has not turned up to the matrimonial home and thus there is desertion by the appellant - wife for a continuous period of not less than two years immediately preceding the presentation of the petition.

21. No doubt, as stated earlier the appellant - wife has also accepted that she is staying separately from the respondent - husband from 29th January 1995. According to the appellant on 27th January 1995 she was on leave and on that day she had been to her parent’s house to see her father who had returned from the native place. In the evening the appellant returned back to her matrimonial home. Since she had food at her father’s house, she did not eat anything after returning to the matrimonial home. These facts were known to the respondent - husband. The appellant has further denied that she was making any preparation on her part to leave the matrimonial home. According to the appellant, the appellant noticed some hushed talks among the respondent - husband and his parents. The appellant could smell something being planned by the respondent - husband and her in-laws, as the

mother-in-law of the appellant started packing the clothes of the appellant in a suitcase. It was further noticed by the appellant that the family friend Mr. Ananthraman who was advising the family in all matters, repeatedly kept coming in and going out of the house after giving some instructions secretly to the respondent and his parents. According to the appellant - wife, by about 4.00 p.m. her in-laws packed her clothes and other belongings except ornaments and the sarees and other dress materials given to the appellant by the respondent. On being enquired by the appellant, the in-laws informed the appellant that she should leave the house at the moment and that her parents would be coming to take her to their home. According to the appellant, she saw all these things silently.

. According to the appellant- wife, at about 5.00 p.m. her father came to the matrimonial home and informed that he had come pursuant to the frequent telephonic calls received from the father-in-law of the appellant in the last two days. According to the appellant, the respondent’s father did not allow the appellant’s father to come

inside the home and immediately kept the packed suitcase outside the flat and asked the appellant to get out of the house along with the child. According to the appellant, the in-laws also started abusing the father and brother of the appellant in the presence of the appellant. The appellant asked the respondent - husband what he had to say about it. Whereupon, the respondent - husband also asked appellant to follow his parents instructions and to go to the her parents house. Thus, the respondent and his parents thrown the appellant out of the matrimonial home on 29th January 1995. The appellant was not allowed to take the dress of the child and was only allowed to carry what the in-laws had packed earlier in the suitcase. Thus, the case made out by the appellant -wife is that she had not deserted the matrimonial home permanently or otherwise.

22. So far as the incidence of taking ornaments is concerned, it is the case of the appellant-wife that when she was asked to go out of the house, her ornaments were with the respondent - husband. In the month of April 1995 there was marriage of the appellant’s brother and therefore,

the appellant wanted to have those ornaments to wear on that occasion. Therefore, the appellant's father telephoned to the respondent's father requesting to release some of the ornaments to wear on the said occasion. However, the respondent's father informed that the appellant's father should write a letter to that effect and thereafter the ornaments would be given. Therefore, the appellant's father had written a letter to the respondent's father on 18th March 1995. Whereupon the respondent's father informed to collect the ornaments on 26th March 1995. Accordingly, the ornaments were collected on 26th march 1995. According to the appellant, the receipt was required to be passed, since it was being asked by the father of the respondent. Thus, the appellant - wife has made out a case that ornaments were taken since there was marriage of her brother and it was not with any animus to separate permanently from the respondent - husband.

23. Thus, from this material it is admitted that on 29th January 1995 the parties have separated. On that day, the father and brother of the appellant had been to the matrimonial home of

the appellant. It is further admitted position that on 27th January 1995, after the return from the office, the appellant had not taken food and that since 29th January 1995 the appellant is residing with her parents. It is further an admitted that on 29.1.1995 the appellant left the matrimonial home accompanying her father and brother. It is further admitted that on that day the wedding sarees of the appellant and dress material of the child-Vidyalakshmi which were given by the respondent - husband remained at the house of the respondent - husband. It is equally admitted that on 26.3.1995 the ornaments of the appellant were taken by the appellant from the respondent - husband.

24. As against this, the disputed facts are as to whether on 27.1.1995 the appellant had not taken food because she went on hunger strike and as to whether on 29.1.1995 respondent - husband lodged the complaint with CID Social Security Branch apprehending the trouble from the appellant and her parents; as to whether the appellant herself had packed her clothes in the bags and/or it is the mother-in law of the appellant who had packed the

clothes of the appellant in the bags; as to whether the father and brother of the appellant came to the matrimonial home on 29.1.1995 as per the plan with the appellant and/or as per the telephonic calls given by the parents of the respondent. It is further disputed as to whether the ornaments were taken with an intention to permanently separate or were taken on the occasion of the marriage of the brother of the appellant.

25. The answer to these questions shall have to be traced to find out as to whether on 29.1.1995 the appellant and respondent separated physically, whether there was animus deserendi developed with the appellant on that day. If it is found that the appellant has gone on hunger strike since 27.1.1995 and has ultimately left the house without the consent of the respondent-husband along with her father and brother leaving behind her wedding sarees and dresses of the child which were bought by the respondent and afterwards had collected the ornaments as stated above, then it can be safely inferred that it is the appellant who has left the house and there is desertion by her.

. However, if it is found that she was not on a hunger strike and that she had not taken food on 27.1.1995 because she had food at her parents house and that the fact of not taking the food has been wrongly apprehended by the respondent - husband and his parents so as to call her parents to take her back to their house and for that purpose the mother-in-law of the appellant had packed her clothes and asked the appellant to go along with her father and brother, then it will have to be inferred that the appellant has not deserted the respondent.

. We make it clear that this issue simply cannot be answered only on the basis of instance or instances which had taken place between 27.1.1995 and 29.1.1995. But in order to come to a conclusion whether on that day there was animus deserendi developed with the appellant, the facts antecedent to the date of the separation and the facts subsequent to their date of separation will have to be assessed and analysed, as their conduct and behaviour is product and consequence of animus slowly developed from the earlier instances in their life, from the day of marriage till the date

of separation and on the basis of preponderance of probabilities the disputed questions will have to be answered.

26. The appellant and respondent married on 14th May 1992 and they have separated on 29th January 1995. Thus, hardly they have consummated the marriage for two and half years. Out of these two and half years it appears that upto 6.12.1992 the appellant was with the respondent - husband. On that day, the appellant left for her parents home for delivery. She delivered the female child, named as Vidyalakshmi on 2.3.1993. After delivery she had returned to the matrimonial home in the month of July 1993. From the letter dated 21st December 1993 it can be seen that the disputes started of the appellant with her in-laws and that on 26th September 1993 the parents of the appellant had visited the house of the respondent. Further it is revealed that at that time the appellant-wife was at her parents house and the respondent husband was called to see her on October 2, 1993. However, it appears that on October 1, 1993 and October 23, 1993 there was dispute between the appellant and the respondent which will be dealt

with later on.

27. It appears that later on the appellant came to the matrimonial home. From the letter dated January 1995 written by the respondent - husband it is revealed that between the period of 26.1.1994 to 16.4.1994, the appellant was with her parents and further from the period of 21.8.1994 the appellant and respondent have stayed in a separate flat belonging to them at Kalyan. While, the parent of the respondent and daughter Vidhyalaxmi stayed at matrimonial home, i.e., 3/36 Azadnanagr, Andheri (west). Between the period 24.9.1994 to 29.10.1994, it appears that couple had visited their native place and thereafter returned to stay at Kalyan. It appears that from 4.12.1994 to 5.1.1995 the parents of the respondent - husband along with child Vidyalaxmi had been to the native place and they returned to Mumbai on 5.1.1995 and thereafter within a short period, i.e., on 29.1.1995 the appellant and respondent separated.

28. The facts will show that the period in which the appellant and the respondent and the parents of the respondent were together and the

conduct of the parties in this period has to be considered. It is made clear that there may be missing links of the period when the appellant may be with her parents but the exact dates cannot be traced from the evidence and pleadings of the parties. However, the above dates will also point out that the appellant and the respondent had a very short span to stay together and in this short span they have separated.

29. Admittedly, the appellant and respondent are employed respectively with the Western Railway at Churchgate and Bank of Baroda, Gavdevi Branch, Mumbai. It is also admitted that the father of the respondent - Gopalkrishanan and mother of the respondent - Palakhimma both are retired persons of the Central Government and they are pensioners. The respondent is the only son, viz., he is not having brother, though he is having a sister. Therefore, he is and has to be a beloved son of his parents and all the aspirations and hopes of the parents of the respondent are vested in the respondent. Therefore, morally, socially and legally he is under obligation to look after and to follow and obey his parents. It further appears

that the parents of the respondent are orthodox Hindu and they desired that their daughter-in-law, namely, the appellant should be an ideal Hindu daughter-in-law, obeying and worshiping the respondent and parents of the respondent and even following every suggestion of in-laws. These aspirations of the father of the respondent are reflected in a letter dated December 21, 1993. While making reference to the quarrels in between the appellant and respondent he has observed in the said letter as :

> "You should remember that he is not coming to your place for quarrelling and getting insulted. The son-in-law is a man. He is your daughter's husband."

. In the said letter he has also complained about the behaviour of the appellant stating that- "After the marriage we started buying spiritual publications for Leela (appellant), but Leela never used to touch them. She says that she is not having any blind belief "God is equal to everybody. We get the results for what we do." On the basis of these things I request you-Leela is wife today, a

mother. GOD HAS GIVEN HER A GIRL CHILD, LIFE IS VERY HEAVY. Advise Leela to live with her husband with peace and happiness."

30. It seems that working hours of the respondent - husband are 9.15 a.m. to 4.50 p.m. while from 10.00 a.m. to 6.30 p.m. the appellant - wife was on duty. The appellant was earning getting salary as per her statement in the sum of Rs.7,000/-. The respondent is getting salary nearabout the same. As a result of their duties, as stated above, the appellant and respondent were away from each other and the parents of the respondent were at home since they happened to be pensioners.

31. The picture has been tried to be made out by the respondent - husband that his mother used to get up early in the morning and after her morning ablutions, she used to keep the breakfast and tiffin boxes ready for the appellant and the respondent. Similarly, she used to keep the dinner ready in the evening so that the respondent would not be put to any inconvenience after her return to

the home and even on holidays and week-ends, his mother used to do like wise, leaving only some sundry work to be done at home by the appellant. And, that the appellant was adopting a non-co-operative attitude towards his aged parents. In the examination-in-chief, the respondent has stated like this. However, this part of story is found to be incorrect and false one, because, the expectations of the parents of the respondent are reflected in the letter dated 21.12.1993. It is mentioned in the said letter that:

> "Early morning at 4.30 a.m. we both will get up and by 7.00 O'clock we finish the whole kitchen work, after that Unni's mother takes bath and goes for prayer. **Leela (appellant) has to prepare tiffin and breakfast for herself and Unni. She must give bath to Laxmi, feed her, put her to sleep and look after her own work.** By 9.15, 9.30 she goes to office. When we ask why you are not putting the child to sleep before going to office nowadays, she said that there is no guarantee that I can put the child to sleep before going to

office.

Then Unni's mother said you should stop frying rice and boiling eggs in the morning. You change these things to the evening. If fried rice is a bit less on one day think that it is enough for that day and take a bigger vessel the next day. You should iron your clothes on the previous day. If you adjust like that you can keep up economy and you can devote more time to Lakshmi first and then secondly to Unni. This is not acceptable to Leela."

32. From this discussion in letter, it is clear that the expectations of the parents of the respondent were that Leela (appellant) should prepare food for herself and her husband. She should give bath to the child and see that the child is put to sleep. She shall also look after other household things. These expectations show that the story made out by the respondent - husband, as stated above, was made out for the purpose of petition only. On the contrary, it was

the appellant - wife who was doing and was expected to do every household work. Accordingly, the appellant has stated in written statement and deposed to that effect.

33. The case made out by the appellant - wife is that it is the appellant- wife who was doing every household work, viz., cooking, cleaning, ironing clothes etc. before going to the office and after returning from the office. This seems to be the true story, since the appellant being the only daughter-in-law it was expectation of the mother-in-law that every household work should be done by the appellant. We, therefore, accept the case made out by the appellant wife that it is the appellant - wife who was doing all the household works.

34. The matrimonial home is 3/36, Azadnagar. According to the respondent - husband, it consists of two bedrooms, hall, kitchen having total area admeasuring 400 sq. feets and has enough privacy. The wife has averred that though the total area of the flat is 400 sq. feet it is originally 1-bed-room, hall, kitchen self-contained flat. The

appellant has denied that there are two bedrooms, one hall and kitchen and enough privacy. We find that the respondent - husband has accepted in his evidence in cross-examination that the balcony is converted into room and that he is treating it as a bedroom. This shows that on the small point also the respondent is not ready to accept the fact that in the said house there is no enough privacy. In fact the said flat had only one bed room and other so called bed room is a balcony. It is further revealed that, as stated by the appellant - wife that after their marriage, immediately the sister of the respondent had come to reside along with them and there was no privacy. It is revealed that Sindhu stayed for a period of four months at her parent’s house after the delivery. It is further revealed that Sindhu, sister of the respondent used to come on Friday and go back on Sunday. Thus, in initial days when the appellant and respondent were newly married, it is expected that at least on Saturday and Sunday there should be sufficient privacy to the couple. However, on those days there used to be parents and sister of the respondent in the house wherein the accommodation is one bedroom, hall, kitchen flat. This,

naturally resulted into disturbances into privacy and the mental starvation of the newly married couple. That naturally had created tensions in the family. In fact, it is admitted position that family was possessed of a 500 sq. feet flat at Kalyan having two bedrooms, hall, kitchen. The said flat was lying vacant. In view of the insufficient accommodation and disturbances to the privacy, it would have been appropriate to shift the family and/or to allow the respondent to make a matrimonial home at Kalyan in initial days. However, for the reasons best known to them it was not done, which naturally resulted into mental and physical tensions between the parties disturbing their matrimonial peace and happiness.

35. Further, it appears that the respondent has tried to make a show that the appellant was not giving any salary in the home and she did not disclose her salary slip. On the contrary, it is the respondent’s father, who has opened a bank account and postal accounts in the name of the appellant and grand-daughter - Vidyalaxmi. Answering to this, the appellant has stated that the practice in the respondent’s house was that

every household purchase and management was looked after by the father of the respondent and that after the marriage the appellant used to hand over the salary and salary slip to the respondent and the respondent in turn used to hand over the said amount to his father. The father of the respondent told that out of this amount, Rs. 1,000/- would be taken for household expenses and rest of the amount would be invested in the bank in the name of the appellant and respondent, in a joint account. Accordingly, the arrangement was implemented by the father of the respondent. She has further stated that the money was so valuable to the family that even the amount of maternity leave benefits was also obtained from the appellant and was invested in the banks and posts. According to the appellant, she was only allowed to kept Rs.100/- for her pocket and travelling expenses.

36. In the light of these facts, on preponderance of probabilities we find that what the appellant wife has stated must be true. For the reason, no wife in early days, when she has just married will refuse to disclose the salary to the husband and refuse to part with the amount. On

the contrary, in the early days, she wants to be absorbed in the new family and win the confidence of the family and she shall be making every effort to hand over the salary to the husband. It is possible that after the relations are strained, she may refuse to do that. But in early days it is unbelievable that the wife will refuse to part with the salary and disclose the pay-slip. It is further revealed from the evidence as reflected in the cross examination of the respondent that they have opened a bank account in the Corporation Bank and his father is pensioner and getting pension of Rs. 5000/- to 6000/- per month. He has stated that he did not know the exact year till when my father deposited the amount in the account. He further showed ignorance in respect of the account being continued. However, he has admitted that Rs.10,000/- were kept in the fixed deposit in the name of his daughter in Canara Bank and that he has not handed over the Fixed Deposit receipts thereof and other F.D. Receipts to the appellant. This along with the unshattered statement of the appellant - wife make it crystal clear that every month, the appellant wife used to give the salary to the respondent and respondent in turn used to

give the said salary to his father, who after using some of it for household expenses used to deposit rest of the salary in the Joint name and/or in the name of the respondent as per his will and wish. This is analysed only to demonstrate that on this issue also the dispute has been raised in the petition and respondent has tried to impress upon the court that the appellant refused to part with her salary amount and in order to contribute in the household expenses since beginning. However, such is not the inference. On the contrary, the material on record shows that the wife has handed over the total salary to the respondent- husband, as stated above, which was invested by his father in the banks. This further shows that they were miserly persons and the did not allow the appellant to use her own salary as per her own wish and she was allowed to keep only Rs.100/- with her for her monthly expenses.

. This has a bearing further on a fact while making grievance against the appellant-wife that she is a miserly woman and was equally careless in respect of the child. The incident has been pointed by the respondent - husband that in the

month of July 1993 the respondent had asked the appellant to purchase milk bottle cleaner so as to clean the milk bottle which was being used for feeding Vidyalaksmi. According to the respondent - husband, even though the price of the said brush was less than Rs.50/- the appellant did not purchase it. While explaining the said incident, the appellant - wife has stated that she had no money and when she asked money from the respondent, respondent refused to give money. Therefore, she could not purchase the said bottle cleaner. Story made out by the appellant, in our opinion, is true. It is clear from the statements reflected in the letter dated 21st December 1993, written by the father of the respondent to the father of the appellant. In the said letter it is stated that- "Nothing is serious for Leela. Everything is easy. In the beginning of October 93 she was asked to purchase a brush to clean Lakshmi's feeding bottle from Asiatic at Churchgate (because it was not available here), Unni did not give her cash so she did not buy the brush. On 27th November 1995 myself and my wife went to Churchgate and brought the brush. When we say the above truth you can estimate her love to her daughter. The cost of the

brush is Rs.15/-. See how adamant she is. If she is so adamant in the case of her own child. You can imagine what will be her behaviour towards others."

37. Thus, it is well established that the amount for purchase of the brush was not given by the respondent or his parents. In this backdrop that the appellant demanded the amount. No mother will avoid to purchase the bottle cleaner if she is possessed of sufficient money.

38. We therefore find substance in the contention of the appellant that since the money was not given by the respondent and she did not have that much money, since she was given only Rs.100/- for pocket expenses, as such the appellant could not purchase the bottle cleaner. In our view, this does not contribute to any act of adamancy and/or miserness on the part of the appellant.

39. The respondent has made a case that in the month of August 1994, the appellant had manhandled his mother without any rhyme or reason. The

appellant - wife has explained the said incident stating that she has not manhandled her mother-in-law. According to the appellant, it was Saturday. At about 10.00 a.m., she went to have a bath in the bathroom with the clothes. The appellant was washing the clothes in the bathroom when the mother-in-law came there shouting and banged the doors. When the appellant opened the doors to find out what the matter was, the mother-in-law pulled the appellant and asked to go to the compound to wash the clothes, since the appellant was not allowed to wash the clothes or utensils in the bathroom. At this juncture, the father-in-law also joined and asked to go out and wash the clothes in the compound as had been instructed. The appellant pleaded that she is fully wet. However, the mother-in-law pulled the appellant out of the bathroom and started beating and pressing the appellant against the wall. Therefore, the appellant shouted for help. When the neighbours started looking out, the in-laws become quiet. At about 2.30 p.m. the respondent returned from office, at that time his parents instigated him with all sorts of allegations against the appellant. As a result of which again

there was quarrel wherein the neighbours intervened, when the decision was taken to shift the appellant and respondent to Kalyan flat. This incident has taken place in the month of August 1994.

40. Thus, it can be seen that on August 20, 1994 some incident has taken place. According to the appellant - wife she had not man-handled her mother-in-law, but it was the mother-in-law who had man-handled the appellant. So far as the respondent is concerned, it is the case of the respondent that the appellant had manhandled his mother. However, it is to be noted that at the time of actual incident the respondent was not at home and he had no personal knowledge of the incident. In the examination-in-chief the respondent has stated that the incident had taken place in July and August 1994. He came from the office. At that time he noticed that the appellant was washing clothes and he came to know that there was some talk between the appellant and his mother, my mother had requested the appellant not to wash the clothes in the bathroom and instead to go outside, near the compound, the appellant got

violent and assaulted his mother. Due to this incident he left and shifted his residence at Kalyan with the appellant.

41. As against this, the appellant has stated that she had not assaulted her mother-in-law in the last week of August on account of washing of the clothes. This incident was reported by the mother-in-law to her husband when he returned from the office.

42. In a letter dated January 1995 (28.1.1995) written by the respondent - husband to his father-in-law, it is stated that on 20.12.1994 Leela (appellant) caught hold of his mother and pressed her against the bathroom door thereby hurting her. This incident compelled him to live separately and see the behaviour could be improved on the part of Leela.

43. Thus, on preponderance of probabilities, it is unlikely that the appellant being the daughter-in-law would man-handle her mother-in-law. It appears from the pleadings and evidence of the parties that there were consistent instructions on

the part of the mother-in-law that after the usual bath, the clothes should be washed outside, in compound and not in the bathroom. We find that all such objections are unknown. In fact, the bathroom is a place where the clothes are washed. If while taking bath the appellant was washing the clothes and at that time the mother-in-law banged on the door and after opening the doors, if she pulled the appellant out of the bathroom in the wet condition, some resistance is possible. However, such resistance on the part of the appellant cannot be attributed to show that the appellant wanted to man-handle her mother-in-law. It appears that the respondent and his parents were expecting that even in that wet condition they should be allowed to hold catch of the hands of the appellant like holding hands of any child and allow herself to be pulled out of the bathroom. It is the aggressive act of the mother-in-law which had led to unhappy incidence. However, by no stretch of imagination it can be said that the appellant had manhandled her mother-in-law.

44. It is further surprising to note that when the decision was taken to stay separately at Kalyan

house, then in that circumstances the parents of the appellant should have allowed the appellant and respondent to go to reside at Kalyan flat along with their daughter - Vidyalaxmi. However, in the present case, the daughter was not allowed to be taken with the appellant and respondent. It is to be noted that in the month of August 1994, child Vidyalaxmi was hardly of one year and it was a breast fed child. In such circumstances, the child should not have been separated from the mother. However, the fact will remain that the respondent and appellant went to reside at Kalyan flat and their daughter was not allowed to be taken with them.

45. It is further revealed from the material on record that even on Saturday, Sunday and Holidays the respondent had not taken the appellant to see their daughter Vidyalaxmi. Thereafter within a short span, it was found that the parents of the respondent were going to native place. The appellant, therefore, in order to see her child had returned to the matrimonial home at Andheri. However, the mother-in-law had taken the child to the native place. Thus, evidence shows that from

24th August 1994 onwards even though the appellant and respondent were allowed to stay separately, their breast fed child was taken by the mother-in-law. The appellant being a mother of Vidyalaxmi could not tolerate such conduct. Therefore, she was insisting for child. Such insistence was not approved by the respondent. From the letter dated 21st January 1995 it is revealed that there was dispute between the appellant and the respondent on the count of their daughter - Vidyalaxmi. It is stated in the said letter that-

> "I advised her that I have no objection to bring the child to Kalyan provided Leela takes care of the child completely. I advised her that she can resign her job or at least take necessary leave for this purpose till our child grows up to a manageable age."

. The respondent has insisted that the child is not kept in creche, thereby leaving the child at the mercy of some third person for nearly 12 hours when they are away at the work. He has further

written that this problem had aggravated severely when his parents came back on 5.1.1995 with grand-daughter Vidyalaxmi. During the period when his parents were away from 4.12.1995 to 5.1.1995, the appellant threatened the respondent by saying that she would drag the mother of the respondent to the court. She also threatened by saying that she would take legal action, if she is not allowed to take the child with her to Kalyan or to her parent's house.

46. Thus, this letter shows that after the appellant and respondent had started to stay separately, the appellant had asked for the custody and care of her child - Vidyalaxmi, which was not allowed by the respondent and his parents. Therefore, there was dispute amongst them. Not only that in order to have company of the child, in stead of staying at Kalyan, the appellant decided to return to matrimonial home at Andheri. However, she was not allowed to stay in the said house by the mother-in-law and she was asked to stay at Kalyan house.

. If we take into consideration the dates of

this dispute, it took place on 5.1.1995 and the segregation of the appellant from her child - Vidyalaxmi was on 21.8.1994. For about 4 to 5 months child was segregated and separated from the mother. We ask a question to ourselves which mother will tolerate a breast fed child to be kept away from her. It was naturally correct on her part to fight with the husband for the child should be brought back to her or some arrangement is made for the child.

47. Under these circumstances, the respondent has expressed her desire to take the child and decided to reside with her in-laws, as reflected from the letter of the respondent addressed to his father-in-law, dated 28.1.1995. Under these circumstances, the incidence of 29.1.1995 had taken place. Thus, it can be seen from the various circumstances and instances which are quoted and considered by us, that several incidences have been manipulated in its own way by the respondent. As against that, we have noticed that the incident is otherwise. Therefore, on the preponderance of probabilities, we find that the case made out by the appellant is a genuine one. We find that near

about 29th January 1995, the situation was created wherein the appellant was thirsty for her child and for that child she was ready to go to any extent, even to separate herself from the respondent - husband. However, that does not mean that there was an intention to permanently segregate and/or separate the marital ties. That separation, which if at all had resulted, on 29.1.1995 was a result of the compelling circumstances created by the respondent and his parents in which the appellant was placed. Therefore, we conclude that at the time of separation there was no animus deserendi developed with the appellant and the respondent has failed to prove that the appellant has deserted the respondent.

48. We have come to the conclusion that there is no desertion. But assuming for a moment that there was a desertion, the provisions of Section 13(1)(ib) of the Hindu Marriage Act, 1955 require that such a desertion shall be for a continuous period of not less than two years immediately preceding the presentation of the petition. Therefore, the animus deserendi to separate permanently shall continue for a period of not less

than two years preceding the presentation of the petition. That means, if within that period if the deserting spouse changes the mind and decides to return back and resume the conjugal relations, the requirement of the section is not fulfilled and decree for divorce cannot be passed.

49. As already analysed, the last occasion on which the appellant and respondent met is on 26th March 1995, when the ornaments were given by the respondent-husband to the appellant. Thereafter, it appears that for a prolonged period there were no relations between the appellant and the respondent, except a fact that on or about August 1995, the birth certificate of Vidyalakshmi was demanded by the appellant by letter and it was accordingly sent by the respondent.

50. Thereafter, we come across a correspondence dated 8.3.1996. It is a letter by the appellant-wife to the respondent-husband. It appears from the said letter that on 6.3.1996, the appellant had been to the office of the respondent along with child- Vidyalakshmi and at that time the respondent instructed to write a letter and

therefore the said letter was written. In this letter appellant - wife writes :

"Dear Unnichetan,

. As per your instructions at the time when I and Laxmi visited you in your office on 06/03/1996, I am writing this letter.

. First of all let me apologize to you for any words uttrered by me which has hurt your feelings. I came to your office on that day on my own, to see you and show our daughter, her father I did not come there to demand anything from you or to harass you.

. Our daughter Laxmi is quite clever and can understand every thing now. Whenever she sees any child with its father she immediately asks "where is my father" when I used to show her your photos. She used to immediately ask me "why he is not coming to see me". Then I used to feel guilty of snatching her from her father and my conecience used to ..... me. That is why I though "Let what may happen, I will take her to you and show you". After returning home, she told everybody whomever she met, that I saw my Achan ((met Acha Kandu, Acha ICREE thann)) she was very happy.

. One year before, my feelings were more important for me than anything else. At that time I thought I can answer her when she grows up but now our child’s future is most important for me than myself. I am prepared to sacrifice anything and everything for her. Neither a father nor a mother can by themselves bring up a child properly. She requires the love and affection of both, our separation will

> hamper, her personality we have to live together for the sake of her upbringing. I do not want any of your properites, assets or money. I want only our love and AFFECTION to our innocent child. So I request you to find out a solution for that.
>
> . Once again requesting you to pardon me.
>
> Yours loving wife,
>
> Leela.

51. By this letter, it is clear that the appellant - wife has apologised and showed her willingness to sacrifice anything and everything for the sake of child and requested to come together even she has asked for solution. It is pertinent to note that in a letter dated 29.1.1995 written by the respondent- husband to the father of the appellant it is stated at the end that:

> "Should Leela change her mind anytime in future, she is quite welcome and she can come any time she feels."

.. Thus showing willingness to accept the appellant - wife. However, when the appellant has

written a letter dated 1.3.1996, referred to above, it appears that the respondent has changed his mind and by letter dated 13.3.1996 he has expressed a surprise about the conduct of the appellant. He has expressed surprise how all of sudden the appellant has developed a feeling of guilt and has shown readiness to sacrifice anything and everything for the sake of child. Speaking about solution to the problem, he has stated in the said letter in the following language :

> "I am convinced from the past experience, that you have chosen to write the above letter at the behest of someone also for laying foundation for future. It is said if a tigress becomes vegetarian, it can only be out of two compelling reasons; (a) that she has become too weak and old to digest now- vegetarian food, and/or (b) that she has lost all her tooth. I am not certain which will be applicable in your case, as your usual roaring continued even when you visited me on 6.3.1996. I am afraid, if I have to believe your letter in its entirety, you will have to do something much more, an up-hill task to convince me otherwise."

. He has further observed that:

> "I am fully convinced that your letter dated 8.3.1996 is nothing but an eyewash to fool someone

also to fall in your pray."

. And, ultimately in the said letter he requested the appellant to surrender the child Vidyalakshmi after completing all legal formalities.

52. Thus, from this letter it is found that the respondent has shown willingness to accept the child - Vidyalakshmi but has not shown willingness to accept the appellant - wife.

53. The appellant had replied to the said letter by letter dated 26.3.1996, which reads as under:

> Dear Unnichetan,
>
> . Helplessness - Yes as your have correctly pointed out that I have become like a tigress who have turned vegetarian. Since I have lost the will power or the teeth. Day by day I am realising this truth. The future is dark and cloudy, and I do not see any silver lining. The only place where I will get eternal protection is at the Lords feet of Sree Guruvayurappan and I submit everything to him.
>
> . I am doing a lot of instrospection now a days. The million dollar question is why our child suffers ? <u>Because she could not select her parents.</u> Similarly, why my husband suffer because I happened to be your wife. Your mindset finds it difficult to accept me with all the plus minus

points, i.e., in totality why I suffer ? BEcause, my mindset find it difficult to accept you with all the plusd and minus points, i.e., in totality.

My father is not my choice.
My mother is not my choice.
My daughter is not my choice.

. My husband and in-laws also not my choice. The way in which I think also perhaps not my choice. All an HIS choice similar is the case with you. Is it not ? Whom to blame then no one can be blamed.

. Sri. Guruvayoorappan has given us some inputs. Neither we can increase it nor decrease it. By praying unconditionally what we can get is the ability to optimise the inputs given to us.

. (Two months back I have felt all these. The agony which I am undergoing now, makes me closer to HIM, and I feel that he has started turning me). How to optimise ? Once I stop thinking who is right and who is wrong what could have been done and should have been done - all these can be a subject of matter of doubt. (never ending).

. In the process I am losing conjugal bliss, you are losing matrimonial happiness, our child is losing the undue affection. My parents and your go through uneasy time.

Who has gained ? - None.

Who will gain ? - None.

. The only judge who can settle things is HE - Lord Guruvayoorappan.

. You must be wondering from when all of a sudden this (Purendo) bhakti downer on me. I will tell you, bouts of emotional turmoil which is experienced lack of intimacy between the father and mother is going to affect our baby's personality development. Now she is very much missing her father. Suppose she grows up as you have suggested with you she will miss her mother. The effect will be the same.

. You know I am emotional, sentimental and a 'Kepi'. You are intelligent, analytical, rational and technical (even after each para of your lette to your wife). Neither my parents nor me, Neither your parents nor you can find an everlasting solution. Only HE can find out. Please pray for us. I will pray for you.

. Can we change our attitute and aptitudes. Yes I believe if we both wish. If one hand gets paralyse, what should be done. Two alternatives - either cut it since it is of no use OR massage it call it with the other hand. I mean that I have became such a hand for you - tigress without teeth.

. With lots of love.

Yours everlovingly,

Leela.

N.B.: You must understand my earlier letter asking for solution. The solution was not for our child because she is never a problem to find a solution. She is the beatiful gift of our relationship. The solution I asked was for a happy and peaceful married life.

54. The said letter is replied to by the

respondent by letter dated 2nd April 1996 in the following words:

> "Dear Leela,
>
> I have received your letter dated 25.2.1996 by Registered AD.
>
> I am very glad to note that you have started making introspection on your own, although it is very belated, please continue and I wish you all success.
>
> The foot-note of your above letter is rather amusing and I am also equally not able to offer anys solution to the problem created by you yourself repeatedly (Please refer to my letters, dated 28.1.1995, 29.1.1995, 26.3.1995 and 16.10.1995 addressed to your father with copies to you and also my father's letters dated 21.12.1993 and 5.4.1995 addressed to your father). You have, in my opinion, not only closed the doors from all sides, bolted and locked, but also have thrown away the keys beyond retraction. Therefore, only your Lord Guruvayurappan can find the keys and offer you a solution. Pray for it for a long time.
>
> Your loving husband,
>
> (P.G.Krishnakumar.)

55. The letter dated 15.5.1996 is not on record, which is written by the appellant to the respondent. However, reply to the said letter is given by the letter dated 26.5.1996 which is to the following effect:

"Dear Leela,

Reference your letter dated 15.5.96.
"I also miss you, but cannot help it"
i.e., fate. Have to bear it.
With love to Lakshmi.

Yours,

Krishnakumar."

56. From this letter it appears that even the respondent is ready to accept the wife, but he is helpless. There is a letter dated 28.5.1996, again written by the appellant- wife, which is as follows:

Dear Unnichetan,

. Hope this letter reaches you in the pinckest of health. Youmay not want to see me and speak to me also, but till my death I will want my husband and our child her father. I know it is very late to have realised my mistakes.

. Whosever mistakes it may be, but, the ultimate sufferers ae we three (you, me and our child). It will be a great lie on my part, if I say I don’t suffer any pangs of separation. To err is human but to forgive is very much DIVINE. Once again I request you to forgive me for any mistakes that I have done.

> . I have enrolled Lakshmi to the nursery. Her school starts from the 13th June. Please pray for her. She needs your blessings very much. I pray to God not to punish her. Everything said and done our child has to heal the burnt. At present she is very much excited to go to school. Hope the same interest is there in the future also.
>
> . Only one thing I will have always to tell you "WE MISS YOU".
>
> . With lots of love.
>
> Yours lovingly,
>
> Leela.

57. We have reproduced the letters written by the parties practically as they were written by the parties. From the letters it is crystal clear that the appellant- wife has apologised for the errors and wrongs done by her to the respondent. She has expressed her willingness to resume the matrimonial and conjugal relations with all vices and troubles to be suffered by her at the house of the respondent. She has showed such willingness to provide a father and mother to their child - Vidyalakshmi. Her readiness and willingness to return to the matrimonial home is absolutely unconditional. On the contrary, the correspondence shows that it is the respondent who is not willing

to accept the appellant.

58. We find that the desire of the respondent to accept the appellant, which is reflected in the letter dated 29.1.1995 is not genuine one, but that was a show made by him. When the appellant had shown real inclination to return to the matrimonial home, it was the respondent who has not allowed her and has twisted her every such letter by doubting the conduct of the wife. After going through these letters we find that there was bonafide offer on the part of the wife to return back and resume the conjugal relations. Therefore, even if we assume that on 29.1.2005 there was animus deserendi with the appellant, it was not continuous for a period of two years preceding to the presentation of the petition. On the contrary, there was animus reverendi. Therefore, the continuous desertion for a period of two years has not been established.

59. It requires to be mentioned that while the matter was being argued, the learned counsel for the appellant submitted that even today the appellant- wife is ready to come to the respondent with folded hands. In the open Court also the

appellant - wife showed her willingness to resume the marital relations. Therefore, we requested the learned counsel appearing on behalf of the respondent to call for the parents of the respondent and respondent. Accordingly, they were called and we tried to settle the matter by holding the meeting of the parties in Chamber. However, in the said meeting the respondent refused to discuss the matter with the appellant. The parents did not participate in settling the matter. Ultimately, the matter could not be settled. However, the fact remains that even in those efforts the appellant has shown her willingness to join and resume the marital relations without any conditions.

60. All this material persuades us to hold that was neither the animus deserendi is proved by the respondent so as to hold that the appellant has deserted the respondent- husband nor the respondent has proved that there was desertion continuously for a period of two years next before the presentation of the petition. The requirements as provided under section 13(1)(ib) of the Hindu Marriage Act, 1955 are not satisfied. Therefore, the decree passed by the trial court granting

divorce is required to be set aside. We accordingly, set aside the said decree. In the result, we pass the following order.

-O R D E R-

(1) Family Court Appeal No.103 of 2002 is partly allowed.

(2) Decree dated 31st August 2002 passed by the Family Court in Marriage Petition No. A-1291 of 1998 is hereby set aside.

(3) Order for the maintenance of the child is maintained. Marriage Petition filed by the respondent-husband is hereby dismissed.

(S.R.SATHE) **(S.B.MHASE)**